



POLICE DEPARTMENT

MEMORANDUM FOR: Police Commissioner

January 15, 2013

Re: Police Officer Lauren O'Rourke
Tax Registry No. 948397
Midtown Precinct South
Disciplinary Case No. 2011-4910

The above-named member of the Department appeared before me on October 24, 2012, charged with the following:

1. Said Police Officer Lauren O'Rourke, assigned to Midtown Precinct South, while off-duty, on or about January 15, 2011, within the confines of Kings County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Officer during a verbal dispute with an individual known to the Department, threatened to arrest said individual and lifted up her sweatshirt, displaying a firearm.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

The Department was represented by Vivian Joo, Esq., Department Advocate's Office, and Respondent was represented by Michael Martinez, Esq.

Respondent, through her counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Nikolai Gakhokidze and Sergeant Jose Cruz as witnesses. The Department also submitted the out-of-court statements of Person A [Department's Exhibit (DX) 1, recording of telephone interviews conducted on February 17, 2011, and May 12, 2011; DX 2 and DX 3 are the respective corresponding transcripts of the interviews].

Nikolai Gakhokidze

Gakhokidze¹ is 27 years old and has a bachelor's degree from John Jay College. For the past couple of months he was working for the United States Air Force.

On January 15, 2011, between 8:00 p.m. and 9:00 p.m., he was driving his car in the vicinity of Nostrand Avenue and Emmons Avenue in Kings County. His friend, Person A², was sitting in the passenger's seat.

Gakhokidze testified, "There was a slow-moving vehicle ahead of me and I was trying to go around it, at the next block after Nostrand." Nostrand "is a street where two cars can go by" and the car in front of him taking up almost both lanes. The car was white, small four-door sedan. He honked at the car because, he said, "I wanted to make a U-turn already."

The car pulled over as he was about to make a left turn. Gakhokidze identified the driver as Respondent. He opened his rear passenger window. Gakhokidze testified that through her open window Respondent "said derogatory things" to him. When asked

¹ Because the last names Gakhokidze and Person A were difficult to pronounce, throughout the hearing the two Department witnesses were referred to by their first names, Nikolai and Person A.

² See Footnote 1.

what Respondent said to him, he replied, "First, it was, you know, this and that, and then she said, 'Go fuck your mother.'"

Gakhokidze testified, "In my culture, that's like the worst thing you can say, and we don't tolerate that easily, so you know, that's like the worst that you can say in my culture. . . . I guess there was maybe an exchange of words that I don't recall besides that, other derogatory things, but that was the main one that, you know, got me really mad about that."

At that point, he "couldn't see her anymore" and he was talking through the back window. His car was ahead of Respondent's car. He got out of his car and walked toward the back of his car and toward her car. Gakhokidze testified, "I wanted to ask her, because my view of her was blocked, so I wanted to go around and ask her why would you say that to me."

As he was walking toward the back of his car, Respondent "speeded up her car approximately twenty feet, thirty feet and came to a stop." Now her vehicle was in front of him. Gakhokidze testified that after she came to a stop, she jumped out of the car. She asked him, "Do you want to get locked up?" Gakhokidze testified, "She picked up her sweater and she puts her hand on the gun."

He described the gun he saw as black "with a holster in the middle of her jeans." He saw the butt and saw her hand on the butt of the gun. When Respondent displayed her firearm he was about ten feet away from her. He did not know she was a police officer. She did not show him any identification. He just raised his hands and went back to his car.

Respondent got back in her car. Gakhokidze let her go in front of him and make a U-turn. He then made a U-turn. Gakhokidze's friend, Person A, wrote down the plate number of Respondent's car. Gakhokidze went home right after. He lived down the block.

The next day, January 16, 2011, he called the Internal Affairs Bureau (IAB). The reason he wanted to start an investigation he explained, was "because I didn't know what happened, you know, if it was a cop, if it was just somebody with a gun. I didn't know, and, you know, this was around my house and I didn't want problems around my house."

When asked if at any point during his contact with Respondent that he flicked a cigarette at her, Gakhokidze replied, "No, I don't recall that."

On cross-examination, Gakhokidze stated that the reason he got out of his car and approached Respondent in her car was "to speak to them and ask them why would they say such a derogatory thing about my mother if they didn't know her."

Gakhokidze said he did not remember cursing at her. He did not remember what he said to her after he heard her remark about his mother. He stated he did not remember anything he said to her, but did "remember what she said."

He explained that, during this exchange with her, he felt the need to get out of his car and get closer to her, "Because I wanted to know why she would say that about my mother, and if I wasn't in her way -- I was making a left turn and she would just out of nowhere say that to me."

Gakhokidze is familiar with that area because he lives a block or so away. He agreed that when driving on Emmons Avenue, there is angle parking on the left. He

agreed that this type of angle parking requires a driver to park by backing in as opposed to pulling up and backing up in regular parallel parking. He has seen cars there "facing in and out." He agreed that if someone wants to back into that spot, they have to pull a little ahead and then back in.

Gakhokidze remembered beeping two or three times. He did not remember if he flashed his bright lights at Respondent or saw her signal light on. He agreed that he continued to beep his horn at her. Although he argued that he would have no reason to say anything out the window at Respondent because she was in front of him, he said he did not remember if at that point he said anything to her.

He was driving an SUV that was higher off the ground than Respondent's car.

He agreed that after she stopped, he was able to squeeze around her. When he passed her, he did not do any damage to his vehicle. He agreed that after he drove by her, he was free to go. When asked why he rolled down his back window, he answered, "I don't remember why I rolled my back window."

Gakhokidze agreed that so far the scenario he had just described was, in the words of Respondent's attorney, "a pretty everyday occurrence." He agreed that after he was able to squeeze past her, he rolled down his back window so he could communicate something to Respondent.

When asked what did he say, Gakhokidze replied, "Maybe I said, why you driving so slow?" When asked whether that was what he said to Respondent or whether that was what he was saying now, Gakhokidze replied, "Maybe I said that. I don't remember."

Respondent's attorney asked Gakhokidze whether he said, "What the fuck is wrong with you?" Gakhokidze replied, "I don't remember." He stated that all he did remember was Respondent saying, "Go fuck your mother."

He agreed that Respondent was a petite female who was alone, and no threat to him in any way. He stated that he was in his middle twenties, five feet, ten inches tall and weighed 160 pounds. Gakhokidze described his friend Person A as "a skinny dude" around Gakhokidze's age.

As to what he wanted to say to Respondent when he approached her in her car, Gakhokidze explained, "I wanted to ask her why would you say that about my mother if I'm just honking at you."

Gakhokidze denied that he was trying to intimidate Respondent, saying, "No, because she was a woman . . . and a woman does not say things like that." When asked if Gakhokidze realized that his behavior could be intimidating, he replied, "Maybe."

Gakhokidze agreed that during his IAB interview on January 16, 2011, the day after the incident, he said the following: "She's pretty skinny. She's petite, but maybe that's why she went for the gun because she thought I was going to beat her up, but I came to talk to her to ask her why are you -- I'm not going to beat up a girl."

He agreed that until he got out of the car, Respondent had never exited her vehicle. He agreed that when he got out of the car and started walking directly to her door, she moved her vehicle up 20 to 30 feet away. He agreed that by moving her car, she created distance between him and her.

He continued to walk toward her "because she stopped her car." He agreed that when he started walking toward her car and she drove up, he kept walking toward her car.

He agreed that he kept walking toward her car even after it was clear she was trying to get away from him.

He stated that he was about ten feet from her before he noticed that there was a gun in her waistband. When asked if he remembered telling IAB that it was about four or five feet, he answered, "Maybe." After his words from the January 16 interview were read back to him, he admitted that the distance was about four or five feet.

Gakhokidze did not remember telling his interviewers that "an officer pulled a gun on me or pointed a gun at me."³

When asked how far Person A was from him Gakhokidze replied, "He was in the car." When asked again how far Person A was from him, Gakhokidze replied, "I don't remember." He did not remember if Person A ever said to him to get back in the car.

Regarding his decision to go back to his vehicle, Gakhokidze stated, "She had a gun." When asked if he was afraid, he said, "Yes, I was." He did not remember telling investigators that had he been closer to her, he could have taken the gun from her. He did not remember saying that he would have been able to handle himself but she was a little far away at that point. He did remember telling them that he had a familiarity with guns. He agreed that he had stated that he had been to the range and knew what type of gun it was.

Gakhokidze agreed that when he retreated, Respondent never came toward him and drove off. He agreed that Person A took down her license plate number. He stated he did not call 911 from the car. He said that it was "most likely" that Person A took

³Respondent's attorney did not say which interview he was referring to when he asked Gakhokidze this question.

down Respondent's license plate number by entering it into his cell phone. He did not think he had a cell phone at this time.

He said he did not remember smoking at that time. When asked if he is a smoker, he said, "No." The following series of questions and answers ensued:

Q. So how could you not remember if you were smoking at the time if you're not a smoker?

A. I don't remember the exact specific details that you're asking. Maybe my friend was smoking, but I was not smoking at the moment.

Q. Did you or your friend throw a lit cigarette while driving by at the Officer's car?

A. No.

Q. Are you sure about that?

A. I'm not sure but I don't remember.

Gakhokidze testified that if he had a cell phone he probably would have called 911. He agreed that his friend had a cell phone. Gakhokidze said that neither he nor Person A called 911 immediately to express their shock that, in the words of Respondent's attorney: "Oh, my God, some five-foot-four girl just pulled a gun on us!" Gakhokidze agreed that he went straight home after he saw the gun. He did not call 911 from the house, where there is a phone. When asked why he did not call 911 that night, Gakhokidze replied, "I don't know."

Gakhokidze agreed that when he did report the incident, he did not call 911. He called IAB directly. He stated that he has called IAB before that date. He believed he had made a complaint to IAB once before, about something that he saw a police officer

doing that was inappropriate. He had also made complaints to the Civilian Complaint Review Board (CCRB). He did not remember how many.

Gakhokidze said he was sure he had never been convicted of a crime. He admitted that his license had been suspended before. He did not remember how many times or how many times he had been caught driving with a suspended license. He said he never had a fight with police officers and could not recall ever resisting arrest.

Gakhokidze agreed that during his interview he told the investigators that he wanted to report the incident because he was worried that Respondent lived in the area. Gakhokidze testified that his concern was "that this might happen again," and "that we might meet again or I park my car sometimes, maybe something might happen." When asked what he was worried about, he said, "Life happens, so anything."

When asked if he remembered telling investigators that he had asked Respondent if she worked in the 61 Precinct, he said, "Yes, because I thought I had seen her around." When further questioned, Gakhokidze said he did not ask Respondent during the incident whether she worked in 61 Precinct, but asked IAB if Respondent worked somewhere in the area.

Gakhokidze did not remember telling investigators that during the confrontation with Respondent, he felt that he was not close enough to defend himself but he could have. Then he was confronted with his statement from his January 16, 2011 interview:

Yeah, the thing was I didn't know she was cop or not. I didn't know how to react because usually if like somebody pulls out a gun on you, you defend yourself or you run away. I wasn't close enough to defend myself. I would have took the gun out of her.

Gakhokidze's response was, "If that's what it says, then that's what it says." Explaining what he meant when he made this statement, he said, "By self-defense." He was then asked did he mean that if he was closer, he would have been able to take the gun from her. He answered, "If I was closer? I don't know. At that moment I was scared. I don't know."

Gakhokidze did not remember telling the investigators that at some point he said to Respondent, "Go ahead shoot me. The NYPD might get a lawsuit right now." He still did not recall this statement after the following was read from his interview

transcript:

Gakhokidze: She said, Do you want to get locked up.
That's what she said.

Sergeant Cruz: That's it?

Gakhokidze: That's all she said. You wanna get locked up? You wanna get locked up?

Sergeant Cruz: Okay.

Gakhokidze: I was like -- and I was like, go ahead, shoot me. I was like, they had no -- NYPD might get a lawsuit right now. . . . If I get shot by accident, I mean, I wasn't hoping that would happen but you know, shit happens like, you know.⁴

When asked if he remembered saying that Respondent acted like a thug and did not present herself as an off-duty police officer should, Gakhokidze responded, "Maybe I said that." Gakhokidze was asked if he remembered telling the investigators that

⁴ Respondent's attorney then received a stipulation from the Assistant Department Advocate that he read accurately from the transcript.

this was "a road rage argument" and that he said, "Whoa, I would never hit a woman unless she hits me, but that would be self-defense." Gakhokidze responded, "No. I don't remember reading the transcript."

To refresh Gakhokidze's recollection, an excerpt from a transcript of one of his interviews was read:

Sergeant Hudon: Now, when you -- when you talked to the female sergeant this afternoon, you said she [meaning the officer] might have felt threatened by you. What's the reason she may have felt threatened?

Gakhokidze: Because a man is coming out to speak to a woman.

Sergeant Hudon: Were you shouting at her in any way or waving your arms?

Gakhokidze: No, no. We were both screaming at each other.

Sergeant Hudon: You were yelling at each other?

Gakhokidze: Yeah, like a road rage argument. I came out and I was like whoa, why? I would never hit a woman like unless she hit me, but that's already self-defense.

When asked if this reading refreshed his recollection, Gakhokidze responded, "Self-defense is self-defense." When asked again if he remembered, he replied, "Yes."

When asked if he remembered saying that he called IAB because once he realized that Respondent was a Police Officer he was concerned that maybe he was going to get his tires slashed, Gakhokidze admitted, "Maybe I said something like that."

After being read an excerpt from his telephone interview, Gakhokidze did not recall stating on January 16, 2011:

When she came out of the car and showed me the gun, I got out my car. I'm not gonna stand outside. I kept talking to

her. I'm like, hey, shoot me, you know. Like I was probably like go ahead and shoot me if you are a cop or whatever. I don't know what she was. She didn't present herself as nobody. All I'm thinking is a girl with a gun trying to shoot me, so I said, "Shoot me. I'm not scared."

Gakhokidze said he did not remember if these words were words he said that night to Respondent or just what he told the investigator that night.

Gakhokidze also did not remember saying to IAB that he lived "about a block away" and then stating the following:

That's why I don't want no problems because I know she was looking for parking. Also, because that's what she said. She was like, 'I'm looking for fucking parking.' So I'm sure she lives in the neighborhood. And I said, 'Are you from the 61 Precinct?' She says: No. So she's not from the 61 Precinct because she lives in the same neighborhood.⁵

Gakhokidze admitted to Respondent's attorney that this was the first time that anybody had really confronted him about what happened that night.

On redirect examination, Gakhokidze agreed that when he came out of his car and Respondent drove ahead of his car, his car was not blocking Respondent's path. At that point, Respondent had an open path where she could have just kept driving and passed him.

Sergeant Jose Cruz

Cruz has been a member of the Department for 22 ½ years. For approximately five and a half years, he has been assigned to the Patrol Borough Manhattan South Investigations Unit where he investigates allegations made against police officers or

⁵ Respondent's attorney received a stipulation from the Department that he read accurately from the transcript.

members of service for misconduct. He was assigned to handle an allegation of an off-duty traffic dispute involving Respondent.

On January 16, 2011, Gakhokidze called IAB and said that he had a dispute on January 15, 2011, in Brooklyn with an individual driving a car. His friend, Person A was a witness. Gakhokidze gave IAB the individual's license plate number. IAB ran the license plate number and determined the car belonged to Respondent. Respondent was assigned to Midtown South Precinct on January 15, 2011, and was off-duty that day. She was on probation and owned a Glock 9 mm pistol.

Although IAB handled the initial call, the case was handed over to the Patrol Borough Manhattan South Investigations Unit. When Cruz was assigned the case, he interviewed Gakhokidze and Person A. He interviewed Person A by telephone on February 17, 2011 and May 12, 2011. Both interviews were recorded.

On cross-examination, Cruz agreed that Respondent was on the entry-level probation that every single person that joins the Police Academy goes through for the first few years. This type of probation is completely different from disciplinary probation.

Cruz agreed that he had no information that Respondent had any problems before this incident. Respondent had done six months in the academy and had six months left on probation. She had been assigned to her command for about a year. Her duty status was not modified.

Cruz agreed that in the academy officers are taught tactics for when they are sitting in their cars and are confronted by an individual who may be a threat. Cruz explained, "If I'm working on duty, on duty I'm probably gonna get out of the car and

confront them.” When asked why he would confront that person, he said, “Cause I want to see if they need help or I want to see what’s going on.”

Cruz agreed that an officer seated in a car is in a vulnerable position. This is partly because it is difficult to draw and fire a gun from this seated position. If somebody comes over to the car while the officer’s window is rolled down, he cannot properly defend himself if the person decides to attack. Cruz agreed that if somebody who you think is a threat to your car comes walking or running over, you would have to stand back. Cruz was also taught that if you try to open the door and step out while a hostile individual is right there, that person could do damage to you with the car door. He agreed that it is generally good practice to keep a safe distance between anybody who may be hostile and yourself while getting out of the vehicle. This practice is taught in the Police Academy and in field training.

Cruz agreed that officers are required to carry their firearms off-duty most of the time. The exception to this requirement is if the officer is going to be drinking somewhere or in a place where the officer cannot secure the weapon. He agreed that it was not inappropriate for Respondent to carry her firearm on that day. Cruz agreed that he could not substantiate any allegations that her gun was being improperly carried.

He agreed that off-duty officers are expected to try to deescalate situations. He agreed that when investigating off-duty behavior, he tries to determine whether the officer tried to deescalate the situation. He agreed that off-duty behavior is a different standard than when an officer is on duty.

When asked whether, in a situation where a civilian said to an off-duty officer, “Go fuck your mother,” it would be appropriate for that officer to get out of the car and

confront a civilian, Cruz replied, "I can't speak for every officer. I know I wouldn't." He said that he would not get out of the car to confront that person because then the situation would only escalate. Cruz agreed that if an officer said to him during his investigation, "Well, what was said to me is a big insult in my country," that fact would not justify an officer's getting out of his car to confront someone.

Cruz agreed that when he interviews witnesses or possible victims, his style is non-confrontational. He lets the witnesses tell him what happened. He does not challenge them. He agreed that he tries to verify what they are saying, but he does not call them liars. He does not ask many questions about why they do what they do.

When Cruz took this case, Gakhokidze and Person A had already been interviewed by IAB. They called IAB directly so that the initial interview occurred over the phone. Then IAB called them back or sent out investigators to conduct further interviews. Cruz read the IAB investigative report.

Cruz was not familiar with the interview on January 16, 2011, when IAB called and spoke to Gakhokidze and Person A. Cruz did not know whether they were interviewed together or whether they were in the same room together when each of them were interviewed separately.

On redirect examination, Cruz agreed that you are taught in the Academy that, when you are in a car and are confronted, you protect yourself. He stated that the same tactics do not follow for off-duty police officers.

When questioned by the Court, Cruz explained:

If someone is confronting me and I'm off-duty, I'm not looking for any problems. I'll probably just drive off. . . . If I'm on duty and someone is approaching me, it's my duty to find out what this person wants. If I'm off-duty and

somebody approaches my car, if I don't know this individual, I don't wanna know what they want so I'm just gonna drive off, unless of course I see it's an emergency, I get out and assist, but if I see a person yelling at me, coming toward my personal vehicle, I'm just going to drive off. I'm not going to get involved.

Cruz stated that the misconduct that Respondent committed was when she got out of her car. He stated that Gakhokidze and Person A said that Respondent displayed a firearm.

According to Cruz, police officers in Respondent's situation are taught to either call 911 or the precinct. He explained that if you call 911, you should identify yourself as a member of the Department and request that police respond to the location. Cruz indicated that this situation is "when you're involved in an off-duty incident." You are supposed to stay there unless there is a threat to you, then you are allowed to leave.

On re-cross-examination, Cruz agreed that hindsight is 20/20. Cruz agreed that incidents like this happen in real time and that this incident did not take more than a few minutes.

Cruz agreed that police officers have an absolute duty, whether on-duty or off-duty, to take police action when necessary. He agreed that if an officer walks into a bank robbery with 50 armed men, he is not expected to do anything at that moment. He agreed that if an officer sees the bank robbery from across the street, he is supposed to do something. Cruz agreed that simply being off-duty does not absolve the officer of responsibility.

Cruz agreed that when approached by someone you think might do you harm, choosing to stay to address the situation is not committing misconduct. He agreed that it was not misconduct for the officer to not run away from that person.

As far as how an off-duty officer would respond, Cruz said, "Every individual is different and we all gonna handle things differently."

Cruz agreed that an officer could be in a vulnerable position if the officer is sitting in a car and someone is coming toward that officer in an aggressive manner. Cruz responded that if you have a chance to drive away, you are not vulnerable anymore. Cruz agreed that if there is a threat, he would be allowed to create some distance, a personal safety zone.

When asked whether he would not recommend simply sitting there while an aggressive person walks straight up to the window of the officer's car, he said he would recommend for that officer to drive away. Cruz agreed that if he was in an patrol car, he would never just drive away. Cruz explained that most of the time, in the patrol car, an officer has on all his equipment, including a vest, and is working with a partner, so the threat is not there.

Cruz agreed that if someone had a firearm, turning his back on that person or driving away from a threat might not leave an officer in the best position. He agreed that he would not know who had a firearm until he checked them. He agreed that officers have been shot in the back and in their vehicles.

Regarding whether the Patrol Guide says that an officer should just drive away when someone is coming toward the officer in a threatening manner, Cruz responded that the Patrol Guide does not state how to handle that situation. He agreed that the Patrol Guide does not tell you how to handle every situation. He also agreed that the Patrol Guide does not require you to compromise your own safety. He agreed that you have to decide what is safe to do as an officer.

Person A's Out-of-Court Statements

The Department's investigators sent out a subpoena to Person A on October 16, 2012. Person A acknowledged receipt of the subpoena when the Advocate spoke with him a week ago. He had told her that he would be available to testify.

Cruz had also reached out to Person A who had assured him he would be at the hearing. Person A did not appear. The Department left a message for him. When Cruz was able to reach him, Person A said he could not find One Police Plaza. The following is a summary of Person A's interviews.

February 17, 2011 Interview

Person A said, "This lady . . . stopped in front of us for no reason. He tried to go around her. She started cursing him. Said something about his mom. Nikolai, he came out and talked to the woman and he's not gonna do anything violent but he came out to talk to the woman. And he's not gonna do anything violent but he came out to talk to the woman. The woman came out with a gun."

She was "driving really slow" and then quickly stopped.

When asked whether he heard what Respondent said, he answered, "I'm not really sure exactly what she said. But you know I know Gonzo. He had his window open and he heard exactly what she said."

Gakhokidze and Respondent both stepped out of the car and exchanged words: "Oh, Gonzo say why cursing at my mom Why are you so rude for. I wanted you to move so I could drive straight."

Person A said that Respondent showed her gun. It was in her waist underneath her sweater. She showed her gun and said, "Do you want to get locked up?" Gakhokidze went back into the car and they drove off.

May 12, 2011 Interview

Person A stated that before Gakhokidze and Respondent got out of their cars, Respondent parked her car in front of them. Person A indicated that Respondent's car was parked approximately five or seven feet away from Gakhokidze's car. Person A never got out of the car.

The gun was black and it was "not at her hip but right in the middle down her stomach" in her jeans.

Person A saw them talking mostly near her car. He could not hear that conversation.

When Person A was asked if he could not hear anything, how could he hear her say, "Do you want to get locked up?" Person A responded, "I would - - that's when he was screaming out of the car the window. The back window was open. That's when she said, 'Do you want to get locked up.'"

Cruz asked him whether when Respondent said, "Do you want to get locked up," Gakhokidze was in his car. Person A responded, "He was outside the car. . . . But he was standing in front of the car on my side while she said it so loud enough I could hear it." He explained that "the back window on the passenger side, the back of me was open a little bit."

Respondent's Case

Respondent testified on her own behalf.

Respondent

Respondent has been a member of the Department for approximately three and a half years. After graduating from the Police Academy on December 29, 2009, she was assigned to Midtown Precinct South where she has remained for approximately three years.

At Midtown Precinct South, Respondent answers radio runs for car accidents and stolen property. Most of the time she is on a foot post in locations that include Times Square, Penn Station and Eighth Avenue. She has made approximately 107 arrests in her career. She is currently full-duty and has never been modified by the Department. She has never been the subject of Department discipline and never received command discipline.

On January 15, 2011, at around 9:00 p.m., she was driving along Emmons Avenue in Sheepshead Bay, Brooklyn to visit her boyfriend. She was not working or scheduled to work. She was wearing a sweatshirt, jeans and boots.

Because it was a Saturday night and there were many restaurants and a nightclub in the area, finding a parking spot was difficult. Finding a spot on the weekend usually took her about ten or fifteen minutes. She was driving around in circles looking for a parking spot. She had a certain route along Emmons Avenue that she normally drove in order to find a spot. She described Emmons Avenue as having one lane running west and the other lane running east. In the middle there is an island with 90-degree back-in angle parking spots. On each side of the island, there is a very wide lane. The lane is wide

enough to comfortably fit two cars traveling in the same direction (Respondent's Exhibit A, Google area map depicting an aerial photo of the Emmons Avenue location that Respondent described and where the incident took place).

There is a sign that says back-in 90-degree parking only. The back-in 90-degree parking is not typical for Brooklyn. Because Emmons Avenue is a very big avenue, cars backing out of spots would be dangerous. If the car leaves the parking spot facing out, the driver is able to inch up and see the traffic coming. To park their cars, drivers have to back their cars into the 90-degree angle parking spots. Drivers can not pull straight into the spots. If they try to park any other way, they can be ticketed.

Respondent was driving on Emmons Avenue down the block almost to the intersection of Emmons Avenue and Batchelder Street. The parking spaces were to her left. She testified that in order to park there, a person has to come to a stop a little bit past the spot before backing into it. Respondent put on her signal light and stopped her car. She said that she "pulled it [her car] out, and someone was beeping obnoxiously behind me."

She looked in her mirror and saw she was being "high-beamed." That made her "a little frustrated" so she pulled her car up. She "couldn't tell what kind of car it was." From the way the lights were angled in her mirror she knew that the car was higher than hers. She heard a horn beeped about six or seven times. High beams flashed at her more than once.

She put her car in drive, and now instead of being on an angle, her car was facing straight at the intersection of Emmons and Batchelder. At that point she saw a car "cut" her on her left to make a turn at the intersection. The man she later learned was

Gakhokidze screamed out his window, "Why the fuck are you driving so slow?" His car was now about six feet away from her.

The car passed on her left on the safety zone, between her car and the parking space. There was not a lot of room left there for the car to get by.

She responded to Gakhokidze, "Why are you riding my ass?" She explained that she meant, "Why was he . . . so close to my bumper." She then heard him say "What the fuck did she just say?"

Gakhokidze jumped out of the car and came "very aggressively toward her." He approached her car door with a very hard, determined walk and an annoyed, angry expression on his face. He had a cigarette in his hand, which he flicked through her open window.

As Gakhokidze came toward her, Respondent pulled her car up 10 or 12 feet. She "put some distance between" them. He turned to walk toward her car. She thought there was going to be a physical altercation. She undid her seatbelt quickly and jumped out of the car. She said to Gakhokidze, "It would be in your best interest for you to get back into your vehicle."

When asked why she wanted to create some distance, she explained, "You never want to approach somebody that's coming at you aggressively or in a fighting way head on. I don't want to be head on with you."

As to why she did not just try to get out of her car when she first saw him coming over, she said, "He was close enough to my door where I did not feel it would be safe for me to exit my car there."

When she told Gakhokidze to get back in his vehicle, Respondent's tone was "a little hard" and "authoritative." Her "adrenaline was running" because she "wasn't entirely sure of what was going to happen or if he had something on him." She used the tone that she learned in her training about how to confront people.

After she told him to get back in his car, Gakhokidze "stopped." Person A, the passenger in Gakhokidze's car, stepped out of the car and said to Gakhokidze, "Come on, bro. Let's go. It's not worth it." Gakhokidze then got back in his car. She got back into her car, drove 15 blocks away and found a parking spot.

She was in plainclothes. Her firearm was in an authorized holster on the inside of her pants. As was her practice, she carried her gun in her waistband, on her left side. She kept her shield on the right. She said she tried for "maximum concealability." She explained, "Unfortunately, being a female, and being very small framed, sometimes, like today, it's very hard to hide it."

She did not intentionally display her weapon, pull up her sweatshirt or remove her gun. She never said she had a weapon.

She did believe that Gakhokidze and Person A could have seen her weapon even though she never intentionally displayed it. She got out her car very quickly and abruptly. When she took off her seatbelt, her sweatshirt might have got stuck so that the butt of her gun became visible.

She said that the Glock 19 pistol she was carrying was in a holster "that's seated in the front of my pants." The only part of the gun that would have been visible was the butt.

At no point did she say "Go fuck your mother" or make any references to anyone's mother. Other than her comment about "riding my ass," she said nothing else to Gakhokidze and Person A.

She never said anything to Gakhokidze about working in the 61 Precinct. Gakhokidze never mentioned the 61 Precinct to her. She never said that she was going to arrest him or anything about getting him locked up. She stated that she never used any police language or jargon at all in the very brief interaction that she had with him.

Respondent estimated the entire time from when she got out of and then back in her car was at most 20 seconds. She had never seen Gakhokidze or Person A before this incident.

Respondent explained that she did not just drive away, because she did not know if he had a weapon on him. "[P]eople have been shot in the back before. Because of the way he was acting, she was afraid "to turn away from him." She felt that by facing him she would be in a better position "to try to defuse" the situation quickly. Nothing in her training, whether in the Police Academy or in the Patrol Guide, led her to think that under these circumstances she was required to just drive off and speed away.

The first time that she heard an allegation had been made against her was in March of 2011 when she was questioned at her official Departmental interview. Her duty status was not changed.

She did not report the incident to the Department because she never identified herself as a police officer and she did not know that her firearm had been seen. If she had known her weapon had been seen, she testified, then she would have notified the Department.

On cross-examination, Respondent testified that the cigarette that Gakhokidze flicked through her car window was lit. She did not get rid of the cigarette at that moment. Respondent indicated that "the new cigarettes have the thing in them that if you don't actually smoke them, they go out." When she threw the cigarette out, it was no longer lit.

Respondent testified that Gakhokidze's demeanor when he flicked the cigarette at her was "very aggressive, very angry, very tight." Respondent agreed that she was scared then. She was afraid because an aggressive man was approaching her to fight.

Respondent agreed that before she exited her vehicle to confront Gakhokidze, she did not call 911. She agreed that she did not just leave the scene. She knew that there was a male passenger in Gakhokidze's car. She agreed that when she got out of her car and told him to get back in his, he did not say one word. She said Gakhokidze "stopped dead in his tracks" and got right back in his car.

Respondent was asked if the reason that he went right back in his vehicle was because she showed him her firearm, and said to him, "Do you want to get locked up?" Respondent replied, "Well, that's what he stated. As I stated, I never showed him my firearm."

Respondent stated it was not safe for her to exit the car initially. After she created some distance by driving a little further away, she agreed that it was safe for her to exit the vehicle. She agreed that it was safe for her even though she did not know whether this aggressive individual had a gun.

She was then asked whether she thought it was smart for her as a female alone to get of her car to tell an aggressive man who was accompanied by another man in his car, that it was in his best interest to get back in his car. Respondent replied:

I'm not entirely sure what gender has to do with it. I am a Police Officer. I do deal with men and lock up the majority of men throughout my career. I do know that there's levels of force to be used and not, and if somebody resists arrest, I know I'm not going to shoot them or I'm not going to beat them.

When reminded that Respondent had admitted that she was scared, Respondent replied, "I'm afraid when I go to work everyday. . . . In general, in my life, that's my life. Yes, I was afraid."

Respondent did not dispute that she was armed with a firearm and that it was in the waistband of her pants. She stated that there was a possibility that the butt was sticking out. When she was asked about displaying the gun, Respondent stated, "Well if it was shown, and they could see it, then yes, it would be the butt of the gun that would be showing...That's how my holster is, yes."

When asked by the Court what Respondent was thinking when she got out of the car and said what she said, Respondent replied, "Well, I was thinking either he was going to maybe come to his senses, and number one, realize that fighting over a parking spot -- and he was gonna leave, or things were going to escalate. I was trying to defuse it." She thought she could defuse the situation, because, she explained, "Some people you know, he yelled a lot, and maybe if he saw that I wasn't going to, you know, sit there meekly, you know -- I don't know. I'm not sure."

On redirect examination, Respondent explained that when she normally carries the gun the way she did that night, the butt of the gun is not visible. The gun is not

visible because she wears a shirt, a sweatshirt or a jacket over it. While there is a chance that her sweatshirt may have risen up that night, under normal circumstances, nobody can see her gun.

FINDINGS AND ANALYSIS

Respondent was charged with threatening to arrest an individual and lifting up her sweatshirt to display a firearm during an off-duty verbal dispute on January 15, 2011.

On that night, there was a confrontation between Respondent and Gakhokidze. Respondent said that around 9:00 p.m. she was driving slowly on Emmons Avenue in Brooklyn looking for a parking spot. She explained that she found a 90 degree angle parking spot in the middle island. In order to park in that spot, she needed to pull ahead, stop and then back into it.

Gakhokidze said that he was driving at that time in the vicinity of Nostrand Avenue. There was a slow moving car ahead of him. Respondent testified that Gakhokidze was honking and flashing his bright lights at her while she was trying to back her car into the angle parking space. Gakhokidze agreed that he honked. He did not remember whether he flashed his lights. He did not remember whether he saw her turn signal. He said he was trying to pass her.

When Respondent stopped her car, Gakhokidze testified that he was able to squeeze his car past hers. After his car passed, Gakhokidze testified that he said something to Respondent out his back car window that he could not remember.⁶ According to Gakhokidze, Respondent "said derogatory things" to him and then said, "Go fuck your mother."

⁶ Respondent's testimony indicated that Gakhokidze's car was beside her car when he spoke to her.

Respondent said that Gakhokidze screamed out his window, "Why the fuck are you driving so slow?" She said she responded, "Why are you riding my ass?"

Respondent testified that she then heard Gakhokidze say, "What the fuck did she just say?"

Gakhokidze testified that he then got out of his car to ask Respondent why she would say such a thing about his mother. When Gakhokidze got out of his car, he walked toward her. Both agree that Respondent then drove a short distance ahead of Gakhokidze and stopped and got out of her car.

Gakhokidze claimed that during their face-to face encounter on the street, Respondent displayed her gun and threatened to lock him up. Respondent said that her gun was concealed in her waistband under her sweatshirt. She believed that Gakhokidze may have seen her gun accidentally when her sweatshirt lifted up as she scrambled out of her car. Respondent stated that, after she got out of the car, she told Gakhokidze, "It would be in your best interest for you to get back into your vehicle."

To make a determination, this Court must evaluate the credibility of both witnesses. The Court first considers the testimony of Gakhokidze, the Department's witness.

Gakhokidze admitted that, at some point, he had enough space to drive past Respondent. Although he was now free to drive away, he did not. After he passed Respondent's car, he rolled down his window and said something to Respondent through his back window.

He did not remember what he said when he rolled down his window. He only remembered what Respondent said about his mother. Whatever Respondent said, it was something that Gakhokidze believed that a woman should not say.⁷

When Respondent drove a short distance ahead of him, Gakhokidze testified that he understood that she was trying to get away from him. Still he continued to walk toward her. By his own testimony, Gakhokidze was behaving in an aggressive manner.

Gakhokidze is a man in his twenties, is five feet, ten inches tall and weighs 160 pounds. Another man was in the car with him. Gakhokidze agreed that Respondent was a petite woman who was alone and hardly a threat to him. He agreed that getting out of his car to confront her would probably intimidate her. But he would not hit a woman, he said, unless she hit him first. Then, he asserted, it would be "self defense."

During his cross examination, Gakhokidze's answers were riddled with inconsistencies and contradictory statements.

Respondent testified that at some point as he was coming toward her, Gakhokidze flicked a burning cigarette into her open car window. Gakhokidze testified that he did not remember if he threw a cigarette at Respondent, but said he was not a smoker. He was then asked how he could not remember whether he was smoking at the time if he was not a smoker. He answered that maybe his friend who was in the car with him, Person A, was smoking. When asked again if he or Person A threw a lit cigarette at Respondent's car, Gakhokidze replied, "I'm not sure, but I don't remember."

Gakhokidze said he did not call 911 immediately because he did not have a cell phone. However, he admitted that Person A had a cell phone. Further, he admitted that when he first got home where he had a telephone, he did not call 911. In fact, he did not

⁷ Gakhokidze's actual words were: "... a woman does not say things like that."

notify the Department until the next day when, instead of calling 911, he called IAB directly.

Prior to this proceeding, Gakhokidze had given several interviews to Department investigators. When questioned about his prior statements, his answers showed further inconsistencies.

Gakhokidze testified that he did not think that he had ever said that he was not close enough to Respondent to defend himself and take away her gun. When confronted with his prior statement, Gakhokidze could not deny that he had said that. Gakhokidze testified in this proceeding that he was scared when he saw Respondent's gun. However, he had told a prior investigator that he told Respondent, who he identified as the "girl with a gun," "Shoot me. I'm not scared." When asked whether he actually made this statement to Respondent or only made this statement in his interview, Gakhokidze testified that he did not remember.

During this proceeding, Gakhokidze said he did not know whether Respondent was looking for a parking spot. In one of his interviews, he said that he knew that she was looking for parking in his neighborhood. In this proceeding, Gakhokidze testified that he did not ask Respondent whether she worked at his neighborhood precinct, but that he asked the investigators this question. However, he told the investigators that, during his altercation with her, he had asked Respondent where she worked.

Gakhokidze explained that in filing a complaint against Respondent, his primary motivation was to protect himself from having problems with the police in his neighborhood. He had made complaints about other police officers before to IAB and CCRB. He could not estimate how many. Gakhokidze admitted that his driving license

had been suspended, but could not remember how many times. He could not recall whether he had ever resisted arrest by a police officer.

Person A, Gakhokidze's friend, was the sole eyewitness to the altercation between Respondent and Gakhokidze. Person A did not appear to testify. Instead, the Department submitted transcripts of Person A's interviews by Cruz.

Person A's ability to hear only Respondent's threat but no other words from her or Gakhokidze is questionable. He could only recall what Respondent had said and done, but nothing that his friend did wrong. Based on these interviews in which Person A was not subject to cross-examination, this Court was unable to evaluate his credibility and cannot rely on his version of events.

This Court next considers Respondent's testimony. After graduating from the Police Academy, Respondent was assigned to Midtown Precinct South where she has remained for approximately three years. She has made approximately 107 arrests in her career. She is currently full-duty. She has never before been modified, been the subject of Department discipline or received command discipline.

Once Gakhokidze decided to get out of the car and started walking aggressively towards her, Respondent believed that she was in a vulnerable position. She testified that before getting out of her car to face him, she knew that she needed to create a safe distance between the two of them. She testified that she pulled her car up about 10 or 12 feet ahead of Gakhokidze. Then she got out of her car to face him. Respondent did not know whether Gakhokidze had a gun. She believed that driving away from the scene could mean getting shot in the back.

Respondent testified reasonably that Gakhokidze could have seen the butt of her gun when she was scrambling out of her seatbelt and car onto the street. She has a small frame and was wearing a sweatshirt which could easily have ridden up during her rapid movements. In an attempt to defuse any violence, Respondent told Gakhokidze, "It would be in your best interest for you to get back into your vehicle." She made this statement in the authoritative tone of voice she had learned not long before in the Police Academy. Respondent's attorney argued that Respondent behaved in accordance with her training as a police officer.

This Court finds that Gakhokidze's testimony, filled with contradictions and inconsistencies, lacked sufficient credibility to establish by a preponderance of the evidence that Respondent intentionally displayed her firearm and threatened him with arrest.⁸ By comparison, Respondent came across as forthright and credible. Respondent's attorney argued that Respondent's authoritative voice and language, such as the use of the word "vehicle," alerted Gakhokidze to the possibility that he had been dealing with a police officer. This seems, under the circumstances, plausible.

The Department also argued that Respondent had a duty to withdraw. The Assistant Department Advocate referred to the testimony of Cruz to emphasize that Respondent had the choice to drive away.⁹ Cruz consistently indicated that his own choice would have been to do just that. Yet he also agreed that different individuals may react and handle threatening situations differently.

The Department cited no statute, rule, law or regulation to support its claim of Respondent's duty to withdraw. To ask this Court to make a finding against Respondent

⁸ As has been noted, Person A's statements have no real evidentiary value.

⁹ The Department also argued that Respondent had the opportunity to call 911. The record demonstrated that Respondent did not have time to call 911.

based on this duty would be to create a rule without the benefit of an opportunity to consider all of its ramifications. As implied by the argument Respondent's counsel made, such a rule might create a danger for members of this Department and the public.

One may agree or disagree with how Respondent handled this situation. However, this Court finds no misconduct in Respondent's decision to confront rather than retreat from Gakhokidze.

For all of the above reasons, Respondent is found Not Guilty.

Respectfully submitted,



Amy J. Porter

Assistant Deputy Commissioner ■ Trials

APPROVED
FEB 04 2013

RAYMOND W. KELLY
POLICE COMMISSIONER